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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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12 SCOTT JOHNSON,

13 Plaintiff,

CIV S-04-0699 LKK PAN

14 v.

15 THE NORMAN and EDITH HILL
16 TRUST, PAIMAN RAHBARIAN,

FINDINGS AND RECOMMENDATIONS

17 Defendants.
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20 Plaintiff moves for default judgment against Paiman
21 Rahbarian, following the Clerk's entry of default June 30, 2005.

22 Rahbarian twice appeared in this action, filing an answer
23 July 30, 2004, and a status report August 25, 2004. Plaintiff
24 served defendant and his counsel with notice of the motion for
25 default judgment, as required by Fed. R. Civ. P. 55(b)(2). The
26 hearing on plaintiff's motion was convened October 12, 2005, but

1 neither defendant nor his counsel appeared.¹ The court submitted
2 plaintiff's motion for decision on the papers pursuant to E. D.
3 Cal. L. R. 78-230(h); no further papers have been filed by either
4 party.

5 Plaintiff's first amended complaint, filed May 11, 2004,
6 seeks injunctive relief, damages and attorney fees under Title
7 III of the Americans with Disabilities Act, 42 U.S.C. § 12101 et
8 seq., the California Disabled Persons Act, Cal. Civ. Code § 54.1,
9 and the California Unruh Civil Rights Act, Cal. Civ. Code §51-53,
10 due to defendant's failure to remove architectural barriers and
11 make accessible his massage business known as the "Chalet,"
12 located at 2128 Marconi Avenue, Sacramento, California.

13 Plaintiff, who requires a wheelchair for ambulation, alleges he
14 drove to the Chalet on August 6, 2003, but could not patronize it
15 due to lack of accessible parking and lack of access from the
16 parking lot to the entrance of the building.

17 Plaintiff has stated a prima facie case under Title III of
18 the ADA, viz.: (1) he is disabled; (2) defendant's business is a
19 place of public accommodation; (3) plaintiff was denied access to
20 defendant's business because of plaintiff's disability; (4)
21 defendant's business has architectural barriers the removal of
22 which is "readily achievable." 42 U.S.C. § 12182; Parr v. L & L
23 Drive-Inn Restaurant, 96 F.Supp.2d 1065, 1085 (D.Hawaii 2000).

24 Plaintiff's motion for default judgment is supported by the
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26 ¹ Although prospective new counsel for defendant telephoned my
courtroom clerk prior to the hearing, no substitution of counsel was
filed nor further contact made with the court.

1 declarations of plaintiff, his counsel and their expert, a
2 memorandum of points and authorities and a proposed order.

3 There is no matter of right to the entry of a default
4 judgment and it is within the court's reasonable discretion, even
5 when the defendant is technically in default. Lewis v. Lynn, 236
6 F.3d 766, 767 (5th Cir. 2001); Draper v. Coombs, 792 F.2d 915,
7 924 (9th Cir. 1986); Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th
8 Cir. 1980). The court has considered the possibility of
9 prejudice to the plaintiff, the merits of plaintiff's claim, the
10 sufficiency of the complaint, the sum of money at stake, the
11 possibility of a legitimate dispute about material facts, whether
12 defendants' default was due to excusable neglect, and the strong
13 policy underlying the Federal Rules of Civil Procedure favoring
14 decisions on the merits, see Eitel v. McCool, 782 F.2d 1470, 1472
15 (9th Cir. 1986), and finds that default judgment for injunctive
16 relief and damages is appropriate.

17 Defendant should be directed to remove the following
18 barriers and make the following accommodations at the Chalet
19 within 90 days of service of judgment:

- 20 1. Create 96-inch-wide access aisle on passenger side of
21 accessible space, with striping as required by Cal.
22 Bldg. Code § 1129B.4 and the words "NO PARKING" painted
23 in the access aisle in 12-inch letters.
- 24 2. Post the tow-away sign required by Cal. Bldg. Code
25 § 1129B.5 at each entrance or adjacent to the
26 accessible parking space.
3. Mount a sign with the International Symbol of

1 Accessibility which complies with Cal. Bldg. Code
2 § 1129B.5 on the fence at the front of the
3 accessible parking space. Mount a separate "Van
4 Accessible" sign immediately below.

- 5 4. Install a ramp from the parking lot to the
6 entrance which complies with ADA Accessibility
7 Guideline 4.8 and Cal. Bldg. Code § 1129B.33.5.
- 8 5. Securely fasten the porch floor mats to the porch,
9 or replace the existing mats with mats that grip
10 the floor.
- 11 6. Install handrails which comply with ADA
12 Accessibility Guideline 4.9 and Cal. Bldg. Code §
13 1106.
- 14 7. Install a threshold which provides a level
15 transition from the porch to the interior of the
16 building which complies with ADA Accessibility
17 Guideline 4.1.6(3)(d)(ii), ADA Accessibility
18 Guideline 4.5.2 and Cal. Bldg. Code § 1133B.2.4.1.

19 In addition, plaintiff should be awarded damages of \$4000,
20 the statutory minimum under Cal. Civ. Code § 52(a)² for the

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22 ² Cal. Civ. Code § 52(a) provides: "Whoever denies, aids or
23 incites a denial, or makes any discrimination or distinction contrary to
24 Section 51, 51.5, or 51.6, is liable for each and every offense for the
25 actual damages, and any amount that may be determined by a jury, or a
26 court sitting without a jury, up to a maximum of three times the amount
of actual damage but in no case less than four thousand dollars
(\$4,000), and any attorney's fees that may be determined by the court in
addition thereto, suffered by any person denied the rights provided in
Section 51, 51.5, or 51.6."

Cal. Civ. Code § 52 provides a damage remedy for violations of
Cal. Civ. Code § 51 et seq., the Unruh Civil Rights Act, which include
"[a] violation of the right of any individual under the Americans with

1 single occasion plaintiff was denied access to the Chalet.

2 Plaintiff seeks reasonable attorney fees and costs pursuant
3 to separate motion. See 42 U.S.C. §12205 ("In any action or
4 administrative proceeding commenced pursuant to this chapter, the
5 court or agency, in its discretion, may allow the prevailing
6 party, other than the United States, a reasonable attorney's fee,
7 including litigation expenses, and costs. . ."). The request is
8 reasonable and should be granted.

9 Accordingly, I recommend that plaintiff's motion for entry
10 of default judgment be granted; judgment should be rendered in
11 the form of an injunction directing defendant Rahbarian to
12 remove, within 90 days of entry of judgment, the above-noted
13 architectural barriers that prohibit plaintiff from accessing the
14 services of defendant's public accommodation, the Chalet, and for
15 damages in the amount of \$4000.00. Plaintiff should be granted
16 leave to file a motion for reasonable attorney fees and costs
17 within 30 days of entry of judgment.

18 These findings and recommendations are submitted to the
19 Honorable Lawrence K. Karlton, the United States District Judge
20 assigned to this case. 28 U.S.C. § 636(b)(1). Written
21 objections may be filed within ten days after being served with
22 these findings and recommendations. The document should be
23 captioned "Objections to Magistrate Judge's Findings and
24 Recommendations." The failure to file objections within the
25 specified time may waive the right to appeal the District Court's
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Disabilities Act. . ."

1 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

2 Dated: January 19, 2006.

3 /s/ Peter A. Nowinski

4 PETER A. NOWINSKI

5 Magistrate Judge

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